

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES K. DAVENPORT
Claimant

VS.

KANSAS REHABILITATION HOSPITAL, INC.
Self-Insured Respondent

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Docket No. 1,058,348

ORDER

Respondent requests review of the May 17, 2012, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

ISSUES

The Administrative Law Judge (ALJ) found claimant's neck complaints to be the natural and probable consequence of his work injury. The ALJ found claimant to be entitled to medical care and ordered respondent to provide claimant with the names of two qualified physicians from which claimant was to designate an authorized treating physician for his cervical spine complaints.

The respondent requests review of whether the claimant's alleged neck complaints occurred as a result of the January 10, 2011 accident and therefore, arose out of and in the course of his employment. Respondent argues that the Order should be reversed as claimant never complained of any injury or problems with his neck for well over a year from the accident. Respondent contends that claimant failed to prove that the cervical spine injury arose out of and in the course of his employment.

Claimant argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant claims injury to his cervical spine on January 10, 2011, after shoveling snow and carrying buckets of ice melt from a boiler room in the course of his employment

with respondent. Claimant testified that three hours after this activity he noticed pain and tightness in his shoulder. He reported these complaints and received treatment in the form of physical therapy at respondent's rehab hospital. Claimant testified that he felt stiffness in his neck on the date of the accident. He also reported pain and stiffness in his neck during the course of physical therapy for his shoulder.¹

Claimant was referred to Kansas Orthopedics & Sports Medicine, where he came under the care of orthopedic surgeon Bradley T. Poole, M.D.. The first medical notes from Dr. Poole are dated March 8, 2012. However, those notes make reference to a previous evaluation for which no records were produced.

Claimant initially complained of right shoulder pain from the January 11, 2011 incident at work. An MRI of claimant's shoulder indicated a defect in the supraspinatus with retraction back about 1.5 cm from his footprint. Arthroscopic cuff repair was recommended. There was no mention of claimant's neck in the report. The surgical repair of claimant's right rotator cuff was performed on April 4, 2011. Claimant was referred for follow-up physical therapy, beginning on April 18, 2011. Claimant testified that physical therapy caused him to experience occasional sharp pain and stiffness in his neck. However, neither Dr. Poole's notes, nor the physical therapy notes list neck symptoms.

Claimant remained in physical therapy for his shoulder for several months. On October 4, 2011, claimant displayed improved range of motion and strength with relatively full abduction and forward flexion. He did report soreness towards the anterolateral corner of his shoulder. Claimant was returned to work at the medium level on November 15, 2011. He was restricted to no lifting above shoulder level and allowed to lift up to 50 pounds occasionally, 20 pounds frequently, and 10 pounds constantly. His range of motion was described as excellent on the right side. In fact, claimant's right shoulder was described as being stronger than his left shoulder. Clicking and popping in the shoulder was reported, probably from scar tissue. Dr. Poole opined that this would lessen, but never go away completely.

In the January 31, 2012 report, Dr. Poole indicated no additional surgery was recommended. Although he did note a possible total shoulder arthroplasty was in claimant's future. The last report from Dr. Poole in this record is dated March 13, 2012. There was no indication of neck complaints in any of the medical and physical therapy notes associated with Dr. Poole's treatment of claimant.

Dr. Poole continues to treat claimant's right shoulder. Claimant has had no treatment for his neck. He testified that Dr. Poole's response to his complaints of neck

¹ P.H. Trans. at 8.

pain was that it was a byproduct of the shoulder injury.² Claimant denies any prior problems with his neck.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on December 14, 2011. Claimant reported the right shoulder complaints, describing the injury consistent with claimant's prior testimony. Claimant displayed limited range of motion of the shoulder with loss of strength. X-rays displayed a post-surgery shoulder. Dr. Prostic recommended additional surgery, but did not indicate what procedures he considered appropriate. There is no mention of claimant's cervical complaints in the December 14, 2011 report.

Claimant was referred by his attorney to Travis R. Oller, D.C., for an examination on March 8, 2012. The injury history provided to Dr. Oller was consistent with claimant's testimony, with the exception that neck complaints reported to Dr. Oller did not begin until "the summer of last year while doing physical therapy for a right shoulder injury."³ Claimant reported left-sided neck and upper back pain, a 6 on a scale of 1-10. Claimant also reported a multitude of prior medical treatments, including bilateral knee surgeries in 2001 and 2002, two left shoulder surgeries in 2006, a prior right shoulder repair in 2004 and the right shoulder repair in 2011. There were no indications of prior neck complaints or treatment.

Dr. Oller found that claimant suffers from Chronic Cervical and Thoracic Myofascial Pain Syndrome as a result of injuries sustained to the right shoulder in January 2011 during the course of his employment and the treatment plan which followed. Dr. Oller reported that claimant would benefit from physical therapy, but, due to claimant's complaints and symptoms, he refused to provide chiropractic treatment.

Claimant met with Dr. Edward Prostic for re-evaluation on March 27, 2011. At this evaluation, claimant complained of increasing difficulties with his neck and problems while looking upward or turning to the right, and of intermittent numbness going down to his right hand. Claimant's cervical spine alignment was normal with tenderness of right paraspinal muscles at approximately C5.

Dr. Prostic continued to opine that claimant's shoulder injury occurred in the course of his employment and that additional surgery may be necessary. He went on to state that the dysfunction of the shoulder has aggravated underlying degenerative disc disease of the neck and claimant now has mild C7 radiculopathy and mild carpal tunnel syndrome.

² P.H. Trans. at 11.

³ P.H. Trans., Cl. Ex. 4 at 1 (Dr. Oller's Mar. 8, 2012 report).

He stated that if the neck symptoms got worse claimant should consider additional physical therapy and epidural steroid injections.⁴

Dr. Prostic assigned claimant a 15 percent permanent partial impairment to the body as a whole for the C7 radiculopathy and carpal tunnel syndrome combination and a 25 percent right upper extremity impairment for the right shoulder for a combined impairment of 28 percent to the body as a whole on functional basis.⁵

He went on to find claimant unable to return to work that requires repetitious forceful gripping right-handed, lifting weights greater than 30 pounds to waist height occasionally or 15 pounds to shoulder height occasionally, and that claimant should avoid use of his right hand above shoulder level or frequent or forceful pushing and pulling right-handed and avoid awkward postures for the head and neck.⁶

Claimant met with Dr. Alexander Bailey for an IME, on April 26, 2012. Claimant's chief complaint was neck and shoulder pain, and occasional arm symptomatology. Dr. Bailey opined that it was unclear whether claimant injured his neck at the time of the original accident or during postoperative recovery in therapy, or if he had an underlying degenerative condition in the neck.⁷ Dr. Bailey noted that there was no mention of claimant's neck complaints in Dr. Prostic's original notes.

Dr. Bailey's IME report noted that claimant suffered from a right-sided rotator cuff tear, status post rotator cuff repair with limited success; generalized shoulder girdle muscle strain associated with rotator cuff tear, repair, and sequelae; and moderate to severe degenerative condition, multilevel cervical spine, affecting all levels, not considered work related or a contributing factor. Generalized moderate to severe arthritic condition was apparent.⁸

Dr. Bailey found that claimant did suffer injury to his right shoulder, but in terms of the cervical spine, he found that claimant has a personal condition that is not related to the claimant's work, meaning it was not contributed to, caused or aggravated by his work.⁹ He went on to report that any medical or surgical attention, as it relates to the cervical spine, is related to claimant's personal condition.

⁴ P.H. Trans., Cl. Ex. 1 at 2 (Dr. Prostic's Mar. 27, 2012 Supplemental IME Report).

⁵ P.H. Trans., Cl. Ex. 1 at 2 (Dr. Prostic's Mar. 27, 2012 Supplemental IME Report).

⁶ P.H. Trans., Cl. Ex. 1 at 2-3 (Dr. Prostic's Mar. 27, 2012 Supplemental IME Report).

⁷ P.H. Trans., Resp. Ex. A at 2 (Dr. Bailey's Apr. 26, 2012 IME Report).

⁸ P.H. Trans., Resp. Ex. A at 6 (Dr. Bailey's Apr. 26, 2012 IME Report).

⁹ P.H. Trans., Resp. Ex. A at 6 (Dr. Bailey's Apr. 26, 2012 IME Report).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁰

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹¹

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹²

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."¹³

The ALJ found that claimant has had consistent cervical spine complaints since the work injury which have not been treated. She also found claimant's cervical spine degenerative disc disease has been aggravated by the right shoulder dysfunction. Claimant testified to immediate symptoms in his cervical spine after the right shoulder injury on January 10, 2011. However, none of the medical reports contemporaneous with the accident support claimant's testimony. Even claimant's own medical expert, Dr. Prostic fails to mention the cervical spine at the time of his first examination. This Board Member cannot find that claimant suffered personal injury by accident to his cervical spine on January 10, 2011, while claimant was shoveling snow and carrying buckets of salt.

¹⁰ K.S.A. 44-501 and K.S.A. 44-508(g).

¹¹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹² K.S.A. 44-501(a).

¹³ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

However, the medical reports are consistent in finding that claimant suffered from degenerative disc disease.

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.¹⁴ But, the Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an intervening cause, it would not be compensable.¹⁵

The Board has considered the question of whether an injury, suffered to a separate body part, while attending physical therapy for a work related injury is compensable. In *Zimmer*¹⁶ the claimant suffered injury to her shoulder while undergoing physical therapy for her back. The Board, citing *Taylor*¹⁷, *Roberts*¹⁸ and *Helms*¹⁹, found that under the Workers Compensation Act securing medical treatment is in the course of claimant's employment with respondent and injuries occurring during ongoing medical treatment for a work-related injury are compensable.

Here, claimant testified that his neck condition worsened as the result of physical therapy for his shoulder. Thus, under *Zimmer*, the injury to claimant's cervical spine is compensable as a natural consequence of the original injury to his right shoulder. Therefore, the award of medical benefits for claimant's cervical complaints would be proper as that condition arose out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

¹⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

¹⁵ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

¹⁶ *Zimmer v. Central Kansas Medical Center*, No. 186,009, 1997 WL 229454 (Kan. WCAB Apr. 30, 1997).

¹⁷ *Taylor v. Centex Construction Co.*, 191 Kan. 130, 379 P.2d 217 (1963).

¹⁸ *Roberts v. Krupka*, 246 Kan. 433, 442; 790 P.2d 422 (1990).

¹⁹ *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

²⁰ K.S.A. 2011 Supp. 44-534a.

CONCLUSIONS

Claimant has satisfied his burden of proving that the injuries to his cervical spine arose as the result of physical therapy treatments received for the work-related injuries to his shoulder. Therefore, the cervical injuries arose out of and in the course of his employment, based upon the logic of *Zimmer*. The Order of the ALJ is therefore, affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 17, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
bruce@brucebrumleylaw.com
johnna@brucebrumleylaw.com

D'Ambra M. Howard, Attorney for Self-Insured Respondent
dhoward@wallacesaunders.com
bschmidt@wallacesaunders.com

Rebecca Sanders, Administrative Law Judge